United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7436

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United States Court of Appeals
FOR THE SECOND CIRCUIT

CONNECTICUT STATE FEDERATION
OF TEACHERS, ET AL

P/S

vs.

BOARD OF EDUCATION MEMBERS, ET AL

Docket No. 75-7436

Appellants' Brief on Appeal
from the District Court for Connecticut

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ISSUES PRESENTED FOR REVIEW

Did the District Court err in denying the Plaintiffs' Motion for Summary Judgment and in granting that of the Defendants in that:

I. The Court refused "to engage in an extensive analysis of the merits of plaintiffs' constitutional arguments" when these arguments demonstrate that a board of education denial to a minority union of teacher mailbox, bulletin board, meeting room, and dues deduction facilities violates First and Fourteenth Amendment rights of union members and unaffiliated teachers.

II. The Court relied upon the principal authority of Local 858 A.F.T. v. School District No. 1 in the County of Denver, 314 F. Supp. 1069 (D. Colo. 1970) which is an erroneous decision which inter alia fails even to cite the leading Supreme Court case in point: Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1960).

STATEMENT OF THE CASE

Nature, Course and Disposition

This is an action brought under 42 U.S.C. §1983 in which the Plaintiffs are six municipal locals of the Connecticut State Federation of Teachers and their presidents suing in their official and individual capacities. Their complaint against the members of six corresponding boards of education and six corresponding affiliates of the Connecticut Education Association alleged that these Defendants had by collective bargaining agreements between them, and by policies enforced by the board members, excluded the Plaintiff-organizations from various means of communication with the teachers, and from access to town dues deduction machinery. These denials were asserted to be in violation of the Free Speech and Equal Protection guaranties of the Constitution.

Upon cross-motions for summary judgment the District Court, Zampano, J., held in an unreported decision (Doc. 43) that there had been no constitutional violation. The Plaintiffs appealed.

Statement of Facts

The Court may take judicial notice that the two major teachers' organizations on the national scene are the American Federation of Teachers and the National Education Association. In Connecticut, as in most states, each of these organizations has a state unit, and local chapters in various municipalities.*

*In common parlance they are "the Federation" and "the Association." They will from time to time be referred to by these names in this brief.

The principal efforts of these organizations in Connecticut are directed towards organizing local affiliates which then seek to become the majority organization and to represent the teachers of the municipality in collective bargaining under the Connecticut Teacher Negotiation Act, §10-153a et seq., Conn. Gen. Stats.

In the towns of Hamden, Stratford, Bridgeport, Bloomfield and Westport*, the Association is the majority organization and the bargaining representative chosen under §10-153b, Conn. Gen. Stats. (Complaint, Doc. 1, ¶4 admitted) In each of these towns there also exists a local of the Federation which performs a variety of organizational tasks, seeks to recruit new members and hopes at some time to become the bargaining agent.

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*Meriden was originally involved below, but upon a stipulation dismissing the action against its Board of Education members, the Court dropped them as parties defendant. (Doc. 40)

As alleged in ¶8 of the Complaint (Doc. 1) and as admitted by the answers of the several boards of education, in each of the towns in question the board of education has entered into a contract with the Association affiliate which contains provisions limiting the opportunities of the Federation local in that town to communicate with its members and with other teachers. (Hamden is an exception in that its Superintendent is enforcing a board policy rather than a contract provision; in Bloomfield and Westport contract provisions are supplemented by discriminatory board policies.)

The Federation claim is that each of the provisions in question is a violation of First Amendment rights of free speech and free association, and Fourteenth Amendment rights of equal protection. The following is a synopsis of the provisions in effect in each town:

The Federation locals claim that Hamden and Westport provisions abridge their free speech and free association activities. The Hamden policy (set forth in admitted ¶8(a) of the Complaint) denies the Federation use of the school mailboxes except during the period September 1 through November 30, denies it use of school bulletin board space, and denies it the opportunity to meet on school premises except upon special application and subject to the undefined discretion of an administrator. In Westport (admitted ¶8(f) of the Complaint), a school policy denies the Federation access to mailboxes, bulletin boards and school meeting facilities.

In Stratford, Bridgeport, Bloomfield and Westport, the Federation claims its associational rights are abridged by discriminatory dues deduction provisions. Contract clauses

quoted in the Complaint in ¶¶8(c) through 8(f) (admitted in the answers) grant the Association the right to payroll deduction for dues (commonly known as "dues check-off") and place limitations upon the right of teachers to revoke the authorization of the board of education to make such deductions.* In Stratford, the provision gives exclusive check-off rights to the Association and locks the teacher into the dues deduction plan so that he bears a financial penalty if he drops out of the Association any time during the school year

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*We refer to these provisions which limit the right to change check-off authorization as "lock-in" provisions and claim that, aside from the vice of exclusivity of check-off, a lock-in is itself constitutionally improper. See argument at Pg.41-43 below.

after September 20. In Bridgeport, the provision gives exclusive check-off to the Association and a teacher who elects to have dues deducted for the Association makes the election for the length of his employment by the board or for the period of the Association-Board contract, whichever ends first. In Bloomfield, although the Federation may obtain dues deduction, a lock-in policy requiring thirty days notice before the start of the school year precludes ready switching from the Association to the Federation. In Westport, there is exclusive dues deduction for the Association but no lock-in.

ARGUMENT

Summary of Argument

The Appellants will discuss the development of the constitutional principle enunciated in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) guaranteeing First Amendment rights to students and teachers within the schools so long as the exercise of these rights does not materially and substantially interfere with school discipline. We will discuss the principles enunciated in Healy v. James, 408 U.S. 169 (1972) concerning constitutional protection of the right to organize and be recognized on campus. The contract provisions under attack will be analysed in light of these leading cases and other decisions.

The Court below determined that it was unnecessary to even evaluate these claims

because of Local 858 A.F.T. v. School District No. 1 in the County of Denver, 314 F. Supp. 1069 (D. Colo. 1970). The Appellants will provide a detailed analysis of that opinion to show why it is an erroneous statement of the law. We will distinguish the other authority relied on by the Colorado Court and the Court below.

Neither Students nor Teachers Shed Their Constitutional Rights to Freedom of Speech or Expression at the Schoolhouse Gate and These Rights May not be Limited unless There is a Showing that the Exercise of the Right Would Materially and Substantially Interfere with Appropriate Discipline in the Operation of the School.

In the leading case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Supreme Court reviewed the suspension of two high school students who had worn black arm bands as a show of anti-war

sentiment in face of a school policy forbidding them to do so. The Court recognized at the outset that the act of wearing arm bands was symbolic speech, and that the legal problem was simply the announcment of a balancing test which would define the showing required of school authorities to justify the imposition of limits upon students' free speech rights. Recognizing that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 393 U.S. at 506, the Court set forth the following test:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained, 393 U.S. at 509.

A case analogous on its facts to Tinker but involving a teacher wearing a protest arm band came before this Court in James v. Board of Education, 461 F.2nd 566 (2d. Cir. 1972), cert. den. 409 U.S. 1042(1972). Charles James was discharged when he wore his arm band to school in face of the requests of his superiors that he remove it. Reasoning from the Tinker decision, the majority of the Court reversed the dismissal in an opinion by Chief Judge Kaufman which employed the Tinker standard:

> Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers, 461 F2d. at 571.

The Court went on to state that where a school regulation is under attack, "the question

we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent 'greater than is essential to the furtherance of' those interests," 461 F.2d at 574.

Tinker and James provide the framework within which this Court must consider the Plaintiffs' free speech claims. But Plaintiffs' claims go beyond speech alone, and extend to organizational rights.

The First Amendment Protects Not Only the Right of Teachers to Speak but Their Right to Associate Together.

The Supreme Court has repeatedly recognized "that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press." United Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967); the Court referred also to its opinion in N.A.A.C.P. v. Button, 371 U.S. 415 (1962) where it had held that any attempted limitation on an organization's First Amendment rights could be justified only by a showing of "compelling state interest", 371 U.S. at 438.

The Plaintiffs here are seeking to communicate among members of their organization and other teachers for the purpose of teacher unionism. In addition to their free speech rights under the First Amendment they are seeking to exercise protected associational rights. See Shelton v. Tucker, 364 U.S. 479, 485 (1960); Hanover Township F.T. v. Hanover Community School Corp., 457 F.2d 456 (7th Cir. 1972).

Also in point is Healy v. James, 408 U.S. 169 (1972). In that case authorities at Central Connecticut State College had refused the application for campus recognition which had been presented by a local chapter of Students for a Democratic Society. The Court reaffirmed that "among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs.

While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition," 408 U.S. at 181.

The Court went on to refute the claim which the College had made that there was no abridgement of the students' opportunities for communication because they were free to communicate off campus. The Court pointed out that the consequence of non-recognition was that the organization would be denied the use of campus meeting rooms and campus bulletin boards. It said:

> "If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated

> purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial," 408 U.S. at 181-182.

These observations apply as well to the Appellants' interests here in pursuing their organizational objectives.

The Court recognized in Healy that there are limits upon an organization's right to achieve official recognition and the hospitality of school facilities but in light of the strength of the First Amendment interests of the organization members, it imposed upon school authorities the burden of proving that a decision to deny recognition is justified, 408 U.S. at 184.

There is no basis to conclude that students have any greater right to associate together than teachers. Healy principles apply equally to the case at bar.

A case involving the First Amendment claims of a teachers' organization was decided by the California Supreme Court sitting in banc, Los Angeles Teachers Union, etc. v. Los Angeles City Board of Education, 78 Cal. Reptr. 723, 455 P.2nd 827 (1969). The Plaintiffs there challenged a school rule which precluded them from circulating a petition among the teachers during duty-free lunch hour and limited them to after school hours. The California Supreme Court relied upon the Tinker rule, and upon the compelling state interest standard, in holding them entitled as a matter of law to permission to circulate their petition.

These principles were applied in a factual context most similar to that here present in the case of Friedman v. Union Free School District, 314 F.Supp. 223 (ED. N.Y. 1970). The school board had prohibited the exclusive bar-

gaining agent for the teachers from distributing through the school mailboxes anything other than routine notices of meetings, elections, election results and social events. The District Court relied upon both the Tinker case and the Los Angeles Teachers Union case for its holding that the provision was void on its face and in its application, as an overbroad prohibition of the First Amendment rights of the public school teachers in the district.

Because the Board Actions Here Under Review Discriminated in Favor of the Association Affiliates and Against the Federation Locals They Must be Subjected to Equal Protection Scrutiny, and Upon the Facts Here Strict Scrutiny is Required.

It is obvious from the various provisions under attack that they are designed to favor and do favor the interests of the Association affiliates at the expense of the Federation locals. They must be evaluated upon equal protection grounds as well as upon first amendment grounds. The communication activities and associational rights impinged upon are First Amendment interests and therefore are "fundamental rights." The Supreme Court has repeatedly held that a regulation limiting these rights may be justified on equal protection grounds only by a "compelling state interest," e.g. Rowe v. Wade, 410 U.S. 113, 154-156 (1973);

Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

As Evaluated Under Both the First and Fourteenth Amendments the Board Actions Here Under Review Operate to Infringe the Federation's Rights as Shown by an Examination of the Provisions and Policies in Effect in Each Town.

In light of the foregoing principles we turn first to an examination of the limitations upon communication in Hamden and Westport. The Hamden policy (¶8(a) of the Complaint, admitted) precludes the Federation from using the school mailboxes except during the period September 1 to November 30, precludes it from using bulletin board space, and precludes it from meeting on school premises except upon special application and subject to the undefined discretion of an administrator.* In Westport (¶8(f) of the Complaint, admitted) the board denies the Federation access to mailboxes, bulletin boards and school meeting facilities.

*Under Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971) a due process question is presented by the failure of definition, but it is of less significance than the free speech claim.

Thus, a whole range of communications within the protection of the right of free speech, which would be useful in furthering the Federation's associational interests, also protected by the First Amendment, are forbidden. Moreover, there is a discrimination in favor of the official bargaining agent which is granted mailbox, bulletin board, and meeting room privileges.

The board members in each of these towns then are infringing upon First Amendment interests and claims of entitlement to Equal Protection; this they may not do without shouldering the "heavy burden" of proof, Healy v. James, 408 U.S. at 184, that the activities prevented would "materially and substantially" interfere with school discipline, Tinker, 393 U.S. at 509, and that a compelling state in-

terest justifies the limitations, N.A.A.C.P. v. Button, 371 U.S. at 438, Rowe v. Wade, 410 U.S. at 155. This Court should therefore reach the same result as was reached in the Los Angeles Teachers Union case and the Friedman case, cited at Pg. 17 above, vindicating the Federation's rights.

We turn next to the situations in Stratford, Bridgeport, and Bloomfield where contract provisions admitted in the Complaint in ¶8(c) through 8(f) grant to the Association the exclusive right to dues check-off and lock teachers into their choice. In Stratford the provision affords exclusive check-off to the Association and a teacher cannot drop out of the Association without the financial penalty of continuing check-off through year-end unless he decides to do so before September 20. In

Bridgeport the lock-in is even more outrageous: a teacher who elects to have dues deducted for the Association, makes that election for the length of his employment by the Board, or for the period of the Association-Board contract, whichever ends first. In Bloomfield although the Federation may obtain dues deduction, a lock-in policy requiring notice 30 days before the start of the school year precludes ready switching from the Association to the Federation. The Westport contract provides exclusive deductions for the Association, but contains no lock-in.

The competition for members between the Federation and the Association is an activity within the ambit of the First Amendment: each organization in the course of its membership efforts seeks to furtherits own associational

rights, uses its speech rights in the process, and has as its goal the effective organization of new teachers for the furtherance of their mutual interests. The necessary effect of a discriminatory dues deduction provision is to help one group and to hinder the other. Thus, under the requirement of N.A.A.C.P. v. Button, 371 U.S. at 438, Rowe v. Wade, 410 U.S. at 154-156, the board actions infringe on the Plaintiffs' fundamental First Amendment rights and are violative of the Constitution unless supported by a compelling state interest. It is submitted that there is none.

Cf. Norwalk Federation of Teachers v. Norwalk Teachers Association (Fairfield Superior Court, No. 14 75 56 March 5, 1975)* (holding an exclusive dues deduction clause deters membership in the organization discriminated against in

*reprinted in the Joint Appendix

violation of §10-153a Conn. Gen. Stats. [which is probably only a codification of constitutional rights anyhow] and holding said clause to have "flagrantly violated" the Plaintiffs' constitutional rights).

To all of the above authority the District Court gave no notice. Despite that fact that much of the authority consists of Supreme Court decisions, Judge Zampano preferred to rely upon a six year old "scholarly opinion" of the Colorado District Court.

The case upon which the District Court relied, Local 858 A.F.T. v. School District No. 1 in County of Denver, 314 F. Supp. 1069 (D. Colo. 1970), stated an erroneous view of the law when decided and its error has become more apparent afterwards.

Local 858 was a case very nearly on all fours with the case at bar. The discriminations practiced against the Plaintiffs there were the same as those in effect here. We do not seek to distinguish the case. We claim it to be an incorrect statement of the law which should not be followed in this Circuit, for the reasons which follow.

a) The central fallacy of the Colorado District Court's analysis appears from the following:

> The parties are so situated and the controversy arose under such circumstances that plaintiffs seek to utilize certain facilities that are clearly distinct from pure speech rights. This case presents

> a problem of labor relations, and although the problem is in in the context of public employment, this does not alter its essential character, 314 F. Supp. at 1074-1075.

It is an unsupported ipse dixit that "certain facilities" (i.e. mailboxes, bulletin boards and meeting rooms) "are clearly distinct from pure speech rights." In fact these facilities are the means of communicating speech and as the Supreme Court later pointed out in Healy:

> There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right. The primary impediment to free association flowing from non-recognition is the denial of use of campus facilities for meetings and other appropriate purposes....
>
> Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards....408 U.S. at 181.

Because the Colorado District Court erroneously demeaned the significance of the constitional claim it fell into the error of con-

cluding that the case presented "a problem of labor relations."

As we have argued above, there are constitutional problems which the Court must weigh in this case. We do not assert that the labor context of these problems is irrelevant. We merely assert that the tests which the Court must apply are constitutional and that labor considerations become relevant only where the constitutional tests make them relevant.

b) Support for our claim that Local 858 is in fundamental analytic error arises from the approach of Judge Zavatt ir Friedman v. Union Free School District, 314 F.Supp. 223 (E.D. N.Y. 1970). Dealing with a mailbox question very similar to that presented in both Local 858 and in the present case, he recognized that the starting point for analysis is the Tinker decision, 314 F.Supp. at 226-227. Local 858 must be in error when it omits any citation of

this leading case; conceivably one might distinguish it, but it cannot be ignored.

c) Having failed to accord due weight to First Amendment interests the Colorado District Court concluded that various labor policies justified the denial to the plaintiffs of school communications media and dues deduction rights. However, it never examined those policies with the particularity necessary to show how each such policy justified the denial in question. In what follows, the opinion of the Colorado District Court will be set to the left margin and its error discussed below and to the right.

Local 858, 314 F. Supp.
at p. 1076-77.

"The grant of exclusive [mailbox, bulletin board, meeting room, dues check-off] privileges to one of two competing unions after that union has won a representation election serves several interests. It allows the effective exercise of the right to form and join unions in the context of public employment."

COMMENT

The assertion that exclusive communication privileges allows the effective exercise of the right to form and join unions is a non sequitur. Exclusive communication privileges must as a matter of fact serve to strengthen the majority union at the expense of the minority. It simply does not follow that a statutory scheme which grants exclusive representation rights to the majority requires that the majority have exclusive communication rights as well.

"It provides the duly elected representative ready means of communicating with all teachers, not just the DCTA membership. This is essential since the DCTA represents all teachers, not just its membership."

COMMENT

No one claims that the majority organization should be denied the opportunity to communicate with all teachers; we merely claim that the minority organization cannot be denied this opportunity.

"It eliminates inter-union competition for membership within the public schools except at time of representation elections. This has several salutary aspects. Orderly functioning of the schools as educational institutions is insured through the limiting of the time span when they may become a labor battlefield."

COMMENT

The claim that free communication will make of the schools a "labor battlefield" is wholly speculative. The Supreme Court has said that speculation about the ill consequences of free speech in the schools does not justify its limitation. "In our system, undifferentiated fear or apprehension of distubrance is not enough to overcome the freedom of speech." Tinker, 393 U.S. at 508. It is unfortunate that the Colorado District Court ignored the existence of the Tinker

decision. This Court does not. In James v. Board of Education, Chief Judge Kaufman observed that limitations upon the exercise of free speech require "reasonable inferences [of jeopardy to discipline] based upon concrete facts and not abstractions," 461 F.2d at 571.

"The representative union is not subjected to competition within the schools, and thus is better able to function as a representative, its efforts not spent in constant competition with the union that lost the representation election. The fact that the representative's strength is not bled away by such constant high intensity inter-union conflict allows the public employees better representation, providing a more beneficial exercise of the right of association."

COMMENT

It is always convenient for the party in power to exercise it without criticism from the opposition. Governmental systems exist in which the party in power is able to free itself from such criticism. China and Cuba are two examples of viable governments proceeding on this basis. But in the United States, the premise which underlies our political system is different. Like the political party in

power the teacher organization in power is entitled to function, but not without criticism. Ours is a disputatious society and the First Amendment guarantees that it must remain so. Tinker, 393 U.S. at 509.

"Finally, all of these benefits resulting from the grant of exclusive privileges to the elected representative serve the principal policy of insuring labor peace in public schools. Labor peace means a continuity of ordered collective bargaining between school officials and representatives of the teachers. It means a lowered incidence of labor conflict and strife, thus insuring less interference with the functioning of the public schools as educational institutions...."

COMMENT

"Labor peace" is used here in two shifting senses. It is used to mean (i) peace between rival teacher organizations and (ii) peace between the majority organization and the board. It is unproven that free communication leads to "strife" between organizations. Even if one assumes inter-union strife would be reduced by silencing the minority it does not follow that peace between the organizations promotes peace between the majority and the board. Thus the claim that preferential treatment promotes inter-

union peace is speculative, and the claim that it promotes board-representative peace is doubly speculative, in violation of the Tinker requirement.

"We are satisfied that the grant of exclusive privileges to the duly elected bargaining representative of public school teachers by the School District promotes a compelling government interest. The interests of the above outlined in our discussion of the First Amendment claim are compelling, for labor peace and stability in an area as vital as public education are indisputably a necessity to the attainment of that goal. Inter-union strife within the schools must be minimized. Unnecessary work stoppages and the consequent impairment of the educational process cannot be tolerated without significant injury to public education."

COMMENT

It may be that the prevention of unnecessary work stoppages would provide a compelling state interest but there has been no chain of argument which would tend to show that free communication by the minority organization leads to work stoppages. "Labor peace and stability" is a misleading label. The phrase is only another way of saying that when speech is silenced the result is quiet.

None of the other cases relied upon by the Court below suffice to support its decision.

The Court below buttresses its reliance upon Local 858 by citing Federation of Delaware Teachers v. De La Warr Board of Education, 335 F. Supp. 385 (D. Del. 1971). But this case adds nothing—it consists of lengthy citations from the Local 858 case and cites no other authority on point. If the Appellants are correct in their view of Local 858 then this case too is incorrectly decided. A similar weakness besets the citation of Clark County Classroom Teachers Ass'n. v. Clark County School District, (No. 7894 Nev. Sup. Ct. March 12, 1975). It too rests only upon the authority of Local 858. In particular it accepts the proposition that a compelling state interest sufficient to justify exclusion of the minority

union from use of school communications facilities is to be found in labor peace and stability. Our refutation of this same claim, as advanced in the Local 858 case is to be found at pg.31-35above.

The District Court correctly cites N.L.R.B. v. Jones & Loughlin Steel Corp., 301 U.S. 1, 44 (1937) and N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) for the proposition that the Supreme Court has long approved the grant of exclusive rights to the majority labor organization. But the District Court omits to observe that these were private sector cases, and that no First or Fourteenth Amendment limitations were applicable. Our case rests upon the availability of constitutional protections where the employers are boards of education acting as "agencies of the state in

charge of education in the town." Herzig v. Board of Education, 152 Conn. 144, 150, 204 A.2d 827 (1965). If the employers were private we would not be in Court.

Bauch v. City of New York, 21 N.Y. 2d 599, 237 N.E. 2d 211, cert. denied, 393 U.S. 834 (1968) is the last case cited by the District Court. It involved a challenge to an exclusive dues check-off provision. The case casts no light upon the First Amendment claim which Appellants here make, nor upon their challenge to dues check-off provisions which involve a lock-in clause. In upholding an exclusive dues check-off provision against an equal protection challenge, the N.Y. Court of Appeals did not apply strict scrutiny, but only inquired whether the classification had some reasonable basis. This test might have been proper in

1968, but does not survive Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The policies which were thought to provide a reasonable basis for preferential dues check-off (stability, avoidance of work stoppages) do not promote any compelling state interest, as more particularly appears in our discussion of Local 858 at pg. 31-35 above.

This Court must view the case as posing constitutional questions in a school labor context; application of the required constitutional tests leads to the conclusion that there was error below.

The Appellants have shown that their claims of denial of access to communication facilities must be considered as First Amendment claims, and that therefore under the Tinker test* the Appellees must show that the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline of the operation of the school," 393 U.S. at 509.

The compelling state interest test must also be satisfied in order to justify the limita-

*The Tinker test was held applicable to teacher First Amendment claims by this Court in James v. Board of Education, 461 F. 2d at 571 and to teacher organization mailbox claims by Judge Zavatt in Friedman v. Union Free School District, 314 F. Supp. at 226.

tions upon Appellants' communications activities because the Appellee board members are implementing policies and contract provisions which discriminate between rival organizations in their exercise of speech and associational activities protected by the First Amendment. Once fundamental rights are implicated, equal protection analysis requires the showing of a compelling state interest. N.A.A.C.P. v. Button, 371 U.S. at 438; Rowe v. Wade, 410 U.S. at 155.

As to the subject of dues check-off, we make separate claims about the impropriety of exclusive check-off plans pure and simple, and exclusive check-off plans combined with lock-in provisions limiting the freedom of an individual teacher to change from one organization to another.

Obviously, it is a material assistance to an organization to have the school payroll system function as its collection agent. Members need not be dunned, the whole task of bookkeeping is borne by the school, and the organizational treasurer can be confident that he will receive each month a single dues check supported by cash in bank. When one organization has these advantages it is significantly aided in the very process of operating. When a rival organization is simultaneously denied the check-off it is correspondently disadvantaged. Since both organizations are seeking to exercise associational rights guaranteed by the First Amendment it requires a compelling state interest to justify distinguishing between them.

If the contract also contains a lock-in provision there is an obstacle posed when a given teacher decides to change from the majority organization to the minority. Depending upon

the precise terms of the lock-in he is required for a shorter or longer period to pay dues to the majority. This deterrance to the free exercise of his right of association necessitates the application of the Tinker test: whether a lock-in provision is supported by a showing of its necessity to avoid material and substantial disruption.*

*In Groton Federation v. Groton Education Association, (#04 27 50 New London Sup. Ct., July 1, 1975) (reprinted in the Joint Appendix) the Court held that a contract provision requiring a teacher to take affirmative action to prevent a board from deducting Association dues from his contract, ran afoul of the prohibition contained in §10-153a Conn. Gen. Stats. against "interference, restraint, coercion or discriminatory practices by any employing board of education." In Appellants' view this statute is simply declarative of First Amendment rights under such cases as United Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967); thus the Groton case rests upon a constitutional foundation as well as a statutory one, and supports Appellants' claim here.

By these various routes then Appellant concludes that the Appellees must focus on the particular provisions in question and show specifically as to each provision what interests countervail against those of the Appellant.

It cannot be claimed that the majority organization will be impeded in its ability to serve as exclusive representative if the minority is free to criticize. Appellants would not enter the negotiating room and could not claim to. The majority organization is entitled to perform each and every one of its statutorily defined functions. In Board of School Directors of Milwaukee v. WERC, 42 Wis. 2d 637, 649, 168 NW2d. 92, 97 (1969) the Wisconsin Supreme Court approved the following test:

> "Those rights or benefits which are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be granted to entrench such organization as the bargaining representative." [Emphasis in original]

Appellants believe a line must be drawn between those rights which a majority organization must have in order to fulfill its statutory responsibilities, and those rights which the opposing organization must have under the Constitution. Where these appear to conflict "the First Amendment, made binding on the states by the Fourteenth Amendment, strikes the required balance." Healy v. James, 408 U.S. at 171. There is no requirement of the negotiating function which countervails against the Plaintiffs' claim of constitutional right.

It will not do to say that denying communication and dues check-off rights to the minority

brings labor peace and stability. Of course silence is peaceful, and a majority organization entrenched by check-off is stable. But these are the virtues of a governmental system totally unlike our own. Just as political parties compete for the favor of the electorate-at-large, teacher organizations compete for the approval of the bargaining unit. The vocal opposition is as vital in one context as the other, repression as unthinkable. Openness has risks "and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society." Tinker, 393 U.S. at 508-509.

It will not do to say the schools will become a "labor battleground" if the Plaintiffs

are permitted to distribute circulars. The provocative phrase "labor battleground" suggests some kind of real warfare, but after all the worst that could be predicted would only be exchanges of contention among rival teacher groups. How intense this might be is wholly a matter of conjecture; the Supreme Court pointed out in Tinker that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," 393 U.S. at 508. Chief Judge Kaufman formulated the test as requiring the board to rely only upon "reasonable inferences flowing from concrete facts and not abstractions" in limiting First Amendment rights. James v. Board of Education, 461 F.2d at 571.

Conclusion

The contract clauses and school policy provisions under review demonstrate that the Association has diverted the powers granted it as majority representative to the purpose of suppressing its critics and entrenching itself. Boards of education have yielded to it by agreeing to these clauses and policies. In so doing they have brought the power of government to bear against the constitutionally protected interests of Federation members and unaffiliated teachers. The clauses and policies under review are uniformly unconstitutional. Appellants request reversal of the District Court and the entry of summary judgment on their claim for declaratory relief adjudging the challenged clauses and policies to be invalid.

Dated at Hartford, Conn., this 4th day of October, 1975.

Appellants

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Proof of Service

In accordance with Rule 26(d) Fed. Rules App. Proc., I hereby certify that service of the foregoing brief has been made by this day depositing two copies thereof in the U.S. mail, first class postage paid, to each of the following:

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Dated at Hartford, Conn., this 6th day of October, 1975.

Karl Fleischmann